No. 87-18

IN THE SUPREME COURT OF
THE UNITED STATES
Octotber Term, 1987

CAHOKIA MARINE SERVICE, INC.,
EUGENE P. SLAY and JOAN SLAY,
and INTERNATIONAL SURPLUS
LINES INSURANCE COMPANY,
Petitioners,

v.

AMERICAN BARGE AND TOWING
COMPANY, **In Personam** and
THE M/V ATHENA, Her Engines,
Boilers, Etc., **In Rem,**
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

THOMAS A. CONNELLY, P.C.
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QUESTIONS PRESENTED

Did the Court below err in holding that the Petitioners had no legally cognizable proprietary interest; to-wit, a maintenance servitude for the maintenance and repair of an ice shear/pile dike, thereby depriving them of the Constitutionally protected right to property guaranteed by the Fourth, Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on 5 February 1987, Petition For Rehearing denied on 31 March 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported. It affirmed an order of the United States District Court, Eastern District of Missouri, Eastern Division that the motion of Respondent, American Barge and Towing Company for summary judgment on Plaintiff's Complaint be granted. The Court of Appeals affirmed the order on the basis of the District Court's opinion. The opinion of the District Court is attached hereto as Exhibit A in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered on 5 February 1987, Petition For Rehearing denied on 31 March 1987. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Fed. Rules Civ. Proc. Rule 17.1(a), 28 U.S.C.

STATUTES INVOLVED

The statutes involved are U. S. Constitution, Amendment IV, V ,VII, XIV and Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.

STATEMENT

On May 24, 1984, the M/V Athena, owned by American Barge and Towing Company was downbound through the St. Louis harbor with a tow of fifteen loaded barges when the tow struck the Illinois pier of the Poplar Street Bridge. As a result of the collision, several barges broke loose from the tow. One of those barges, the Tiger 107-B drifted down river and came to rest against an ice shear fence or dike. The purpose of the ice shear fence was to protect water borne rubbish from hitting Petitioner's property which juts out into the river. This is a large concrete structure which is located north of property known as the Cahokia Power Plant, which is owned by the Petitioners.

Petitioners brought an action in the United States District Court, Eastern District of Missouri, Eastern Division seeking compensation for damages to the ice shear/pier resulting from this collision and loss of business income by Cahokia Marine Service, Inc. Respondents then filed a Motion For Summary Judgment alleging that the Petitioners did not have a protectable interest in the ice shear/pier and, therefore, had no legal right to recover damages to the ice shear/pier or loss of business income. Petitioners', however, have a property interest in the ice shear/pier in the nature of an express easement appurtenant, or in the alternative, a maintenance servitude. Petitioners' position is supported by the history of the construction and maintenance of the ice shear/pier, and the interests created pursuant thereto.

On March 14, 1929, Union Electric Light and Power Company (hereinafter "U.E.") (a predecessor in ownership of Petitioners' property) entered into a license agreement with Illinois Central Railroad Company (hereinafter "ICR") for construction and maintenance of a pile dike and riprap pavement. The pile dike was constructed on ICR's property, adjacent to and directly north of U.E. property. Upon termination of the agreement, U.E. had to remove the dike and riprap pavement. On December 11, 1978, U.E. gave notice of its intent to terminate the license agreement dated March 14, 1929, and requested a waiver of the condition requiring U.E. to remove the dike and riprap pavement.

On December 11, 1978, a letter set forth the rationale of the parties not removing the dike. U.E. wrote: "The purpose of this work was to prevent erosion to the railroad property and to our adjoining property. We feel it would be beneficial not to remove these facilities and request your wavier of the conditions in the easement in the agreement where the railroad can require removal of the dike and riprap paving from the premises." On February 23, 1979, the Illinois Central Gulf Railroad wrote back that the agreements were considered terminated as of January 11, 1979, but allowing U.E. to leave the dike (referred to herein generally as ice shear/pier). G & S Motor Company, a New Jersey corporation, purchased the U.E. property on 23 May 1979. (Addendum 31.) On that same date, they deeded their interest in the U.E. facility to Eugene P. Slay and Joan Slay, Petitioners herein, by quit claim deed.

The purpose of the ice shear/pier was to protect the north wall of the Cahokia Power Plant from water borne rubbish and debris. In addition, the Petitioners had a right to maintain the ice shear/pier in order to insure the continued protection which the structure afforded the facilities owned by Petitioners and their tenant Cahokia Marine Service, Inc. Those facts establish a Constitutionally protected property right known as a maintenance servitude. Furthermore, at all times subsequent to the purchase of the property by the Petitioners, they and their leasehold tenant Cahokia Marine Service, Inc., used the ice shear/pier as a breast wire anchor-

age for a captive fleet barge and performed minor maintenance on the structure. At the time of the collision, referred to hereinabove, and the destruction of the ice shear/pier, Cahokia Marine Service, Inc. was commencing construction of a floating barge bulk transfer facility which was to be anchored to the ice shear/pier. The destruction of the ice shear/pier delayed commencement of the bulk transfer activity of Cahokia Marine Service, Inc. for two years, with commensurate lost profits.

Petitioners, in opposition to Respondent's Motion For Summary Judgment, asserted the following points: First, that a December 11, 1978, letter from Union Electric Company and a February 23, 1979, response of Illinois Central Gulf Railroad Company created an express easement appurtenant which was transferred to the Petitioners when they purchased the dominant tenament. Second, that the statements and affidavits submittted in opposition to Respondent's Motion For Summary Judgment demonstrated several factual disputes concerning the ownership interest of the Petitioners in the ice shear/pier. And, third, assuming arguendo, that the Petitioners did not have an easement appurtenant in the ice shear/pier, that they had a property interest in the ice shear/pier due to the fact that their predecessor in title Unoin Electric Light and Power Company built the ice sher/pier to benefit their property located on the Mississippi River and they had a right to maintain the structure; this interest is known as a maintenance servitude.

REASONS FOR GRANTING THE PETITION

In denying the Petitioners' Petition For Rehearing and in affirming the District Court's grant of summary judgment in favor of Respondent, the United States Court of Appeals for the Eighth Circuit abused its discretion by granting Respondent's Motion For Summary Judgment when there was a factual dispute over the type of ownership interest Petitioners had in the ice shear/pier. Summary judgment was granted by the District Court without giving consideration to the evidence presented in the affidavits of the Petitioners as to their ownership interest and thereby deprived Petitioner's of their right to property without due process of law.

Petitioners submit that the decision of the Court of Appeals was wrong, which will be evident to this Court upon a review of the facts, law, and appendixes cited herein.

I. THE COURT BELOW ERRED IN HOLDING THAT PETITIONERS HAD NO LEGALLY COGNIZABLE PROPRIETARY INTEREST; TO-WIT, A MAINTENANCE SERVITUDE FOR THE MAINTENANCE AND REPAIR OF AN ICE SHEAR/PILE DIKE, THEREBY DEPRIVING THEM OF THE CONSTITUTIONALLY PROTECTED RIGHT TO PROPERTY GUARANTEED BY THE FOURTH, FIFTH, SEVENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

A. SUMMARY JUDGMENT IS NOT PROPER WHEN THERE IS A DISPUTED ISSUE OF FACT.

Summary Judgment is only proper when there is no genuine issue as to any material fact and when the moving party is entitled to a judgment as a matter of law. **Fields v. Gander,** 734 F.2d 13, 1314 (8th Cir. 1984); **Fitzgerald v. Williamson,** 601 F.Supp. 92, 94 (E.D. Mo. 1984). All facts and inferences must be viewed in the light most favorable to the non-moving party. **Fields,** 734 F.2d at 1314; **Buller v. Buechler,** 704 F.2d 844, 846 (8th Cir. 1983). The burden is on the movant to prove that no genuine issue of material fact remains and that the case may be decided as a matter of law. **Fields,** 734 F.2d at 1314; **Buller,** 706 F.2d at 846. Here there are disputed facts which should have precluded the grant of a motion for summary judgment.

Throughout the proceedings the contention of the Petitioners has been that Petitioners had a protectable interest in the subject ice shear/pier in the nature of a maintenance servitude, or in the alternative, an easement appurtenant.

The Court erred in granting Respondents' Motion For Summary Judgment in that the Court interpreted Petitioners' case to rely strictly upon a letter request of Union Electric and a written response to the Illinois Central Gulf Railroad in construing the intention of the parties relevant to the termination of the license agreement between them. The Court abused its discretion by not addressing or making

any reference to affidavits filed by Petitioners in support of its Motion In Opposition To Respondents' Motion For Summary Judgment. Those affidavits raise substantial factual support relevant to the intentions of U.E. and I.G.C. Railroad at the time the aforementioned letter agreements were entered into to create a maintenance servitude upon termination of the license.

The Court apparently looked only to the content of the letters when making its decision. The Court erred in taking this approach for the reason that in Illinois the courts have stated that the intentions of the parties can be ascertained from the words of the writing **and the circumstances contemporaneous to the transaction. Hollveen v. Dubnek,** 68 Ill. App. 2d 309, 216 N.E.2d 288 (Ill. App. 1965). Further, a permissive use can be by oral license in Illinois and, therefore, no writing is required to establish a permissive use or right. **Light v. Steward,** 470 N.E.2d 1180 (Ill. App. 1984) at 1184 (3-6). Such circumstances include the situation of the parties, the state of the thing conveyed, the object to be obtained **and the pratical construction given by the parties to their conduct. Stattin Bros. Furn. Co. v. Hauf,** 342 Ill. App. 166, 96 N.E.2d 646 (Ill. App. 1950). Therefore, it is clear that the affidavits were both relevant and probative to the issue of a maintenance servitude.

Moreover, the Court did not address the inferences that should be drawn from an affidavit of A. L. Spiros filed by Petitioners in support of their Motion In Opposition To Respondents' Motion For Summary Judgment. Mr. Spiros, who is the title and closing agent for the I.G.C. Railroad, was familiar with the facts concerning the termination of the license. In paragraph 5 of his affidavit, he averred: "That any responsibility for maintenance or repair of the ice shear/pier-dike would **be upon the owners or occupiers of the Cahokia Power Plant property."** (Emphasis added.) Viewing this averment in the light most favorable to the Petitioners, it demonstrates that upon the termination of the license agreement the owners of the Cahokia Power Plant had an interest in the ice shear/pier in the nature of a maintenance servitude because the owner of the plant had the right to maintain it as clearly established by the Spiros affidavit.

The Court, in its Order granting Respondents' Motion For Summary Judgment, acknowledged that even though it found no Illinois law concerning interests in the nature of a servitude for the construction and maintenance of property, that it assumed Illinois would follow the common law principle which, if established, would grant Petitioners a right to recover damages. (Court's order of June 3, 1986 at 8: Appendix A) citing **Crawford v. West India Carriers, Inc.,** 337 F. Sup. 262, 276 (S.D. Fla. 1971), **rev'd sub nom. on other gounds, Twenty Grand Offshore, Inc. v. West India Carriers, Inc.,** 492 F.2d 679 (5th Cir. 1974), **cert. denied,** 419 U.S. 836. **Crawford, supra.,** stands for the principle that a reparian landowner who constructs a structure **on the land owned by another** has a property interest in the structure. This property interest permits the holder to recover damages resulting from another's negligence, as long as the landowner had a right to maintain that structure. In **Crawford,** the hotel owner who eventually recovered did not own the property on which the groins were constructed, but had obtained a permit from the United States Army Corps of Engineers to construct and maintain these groins. On these facts, the court in **Crawford** allowed the hotel owner to recover, holding that he had an interest in the nature of a servitude for the construction and maintenance of the groins, (a groin is a structure built into the ocean floor to protect the shore from water borne objects) notwithstand the fact that plaintiffs had **no duty** to maintain the groins.

In its Order the Court distinguished **Crawford** from the present case holding that in purchasing the power plant the Petitioners could only acquire the rights which their predecessors held. The Court then found that the Petitioners predecessor in interest, U.E., had a license to construct and maintain the ice shear/pier but relinquished its rights when it treminated the license. The Court then stated "at that point, U.E.'s interest in the ice shear/pier reverted to the railroad." The Court concluded that U.E. did not receive a maintenance servitude upon termination of the license. The Court erred because it apparently looked only to the writings when making its decision. By ignoring the circumstances contemporaneous to the execution of the writings

as set forth in the affidavits offered by Petitioners, the Court made its decision without considering the intentions of the parties, and therefore, the decision is contrary to the principles enunciated in **Hollveen** and **Stattin Bros., supra.**

The present case is indistinguishable from **Crawford.** In **Crawford,** the plaintiff constructed a structure to protect his property on the land of another, while in this case, Petitioners' predecessor in interest constructed a structure to protect their property on the land of another. In the present case, just as in **Crawford,** U. E., the Petitioners' predecessors in title, obtained a permit in the nature of a license for the construction of that structure. In this case, U. E. was granted permission to leave the ice shear/pile-dike on Illinois Central property, and although relieved of the duty to maintain it, U. E. and its successors in title had the right to do so as demonstrated by paragraph 5 of the affidavit of A. L. Spiros.

The affidavit of Mr. Spiros, when viewed in the light most favorable to Petitioners, established that Petitioners had an interest in the nature of a maintenance servitude for the ice shear/pier that protected their property. Consequently, the Court erred in granting Respondents' Motion For Summary Judgment, and abused its discretion, and the Appellate Court in affirming, because there was a factual dispute concerning whether Petitioners have a maintenance servitude in the shear/pier, and the court ignored the affidavit of Mr. A. L. Spiros.

B. IN DENYING THE PETITIONERS' PETITION FOR REHEARING AND IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS, THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRED FOR THE REASON THAT UPON TERMINATION OF THE LICENSE AGREEMENT BETWEEN U. E. AND ILLINOIS CENTRAL, AN EASEMENT APPURTENANT IN THE ICE SHEAR/PIER WAS CREATED AND SUBSEQUENTLY PASSED TO THE PETITIONERS.

Upon the termination of the License Agreement between U. E. and Illinois Central, an easement appurtenant in the ice shear/pier was created and subsequently passed to Petitioners.

Resolution of the issue concerning the ownership of the ice shear/pier, involves riparian land owner rights. When determining the rights of Petitioners as riparian land owners, state law must be applied. **See** 43 U.S.C. Section 932 (1982); **Temple v. United States,** 248 U.S. 121, 129 (1918). In the present case, because the property is located on the eastern bank of the Mississippi, Illinois law applies.

The general rule is that two distinct tenements are necessary to create an easement. **Chicago Title & Trust Co. v. Wabash Randolph Corporation,** 51 N.E.2d 132, 135 (Ill. 1943). The dominant tenement owns the right to use another's property, while the servient tenement is the one upon which the obligation rests. **Id.** at 135-36. An easement creates an interest in land, consequently, it may be founded upon a deed or other writing. **The Fair v. Evergreen Park Shopping Plaza,** 124 N.E.2d 649, 654 (Ill. App. 1955); but can also exist pursuant to an oral license, **Light v. Stewart, supra.** An easement may be created by covenants, contracts or agreements as well as by grants. **Chicago Title & Trust Co.,** 15 N.E.2d at 136; **Coomer v. Chicago and North Western Transportation Company,** 414 N.E.2d 865, 869 (Ill. App. 1980).

"An easement is a right or a privilege in the real estate of another, and, when exercised in connection with the occupancy of other land, it is said to be appurtenant thereto." **Beloit Foundary Company v. Ryan,** 192 N.E.2d 384, 390 (Ill. 1963). Generally, an easement is considered appurtenant when one terminus is on the land of the party claiming the easement. **Allendorf v. Dailey,** 129 N.E.2d 673, 679 (Ill.1955). The boundary of the easement does not have to touch with the dominant tenement. **Id.** The only essential element is that the easement inhere in or concern the land. **Id; Taylor v. Lanahan,** 392 N.E.2d 425, 4258 (Ill. App. 1980). "An easement is appurtenant to land when the easement is created to benefit and does benefit the possession of land in the use of the land." **See** Restatement of Property, Section 458 (1944).

In addition, an easement appurtenant is an incorporeal right which is attached to and belongs with some greater right. **Waller v. Hilderbrecht,** 128 N.E. 807 (Ill. 1920). It is incapable of existence or transfer separate and apart from the particular land to which it is annexed or attached. **Id.** An easement appurtenant passes by conveyance of the land to which it is annexed without being expressly mentioned, and the servient estate continues to be subject thereto until such rights is abandoned. **Messenger v. Ritz,** 178 N.E. 28, 39-40 (Ill. 1931).

Furthermore, "it is well settled that . . . the owner of the easement has not only the right but the duty to keep the easement in repair, while the owner of the servient tenement has no duty to either put or keep the easement in repair." **Triplett v. Beuckman,** 352 N.E.2d 458, 460 (Ill. App. 1976); **Lakeland Property Owners v. Larson,** 459 N.E.2d 1164, 1169 (Ill. App. 1984). The only duty the owner of the sevient tenement has is not to interfere with the use of the easement. **Triplett,** 352 N.E.2d at 460.

In granting Respondents' Motion For Summary Judgement, the court held:

> No document expressly grants an easement appurtenant to the Slays or to their predecessor, U. E. Instead, plaintiffs rely upon the two letters between U. E. and Illinois Central to establish an easement. The court finds the clear intent of these letters was to terminate the 1929 license. Neither letter contemplates any further relationship between the parties with respect to the ice shear fence. Furthermore, plaintiffs present no evidence to indicate that these letters do not contain the true and complete intent of U. E. and Illinois Central. Therefore, the correspondence between U. E. and the railroad did not grant an easement, and an easement appurtenant did not pass to the Slays when they bought the power plant property.

(Appendix A.)

The trial court erred on the issue of the intentions of the parties because representatives of U E. informed Petitioners, at the time of the purchase of the property, that the ice shear was part of the power plant and because no writing at all is required to establish a "permissive use" in Illinois. **Light v. Stewart, supra.** Furthermore, attached to the contract of sale between U. E. and G & S Motors and between G & S Mototrs and Eugene P. and Joan Slay the ice shear (identified therein as a "breakwater") was clearly shown under a description of the property being conveyed. Moreover, the affidavit of A. L. Spiros, who was familiar with the events surrounding the termination of the license states that upon the termination of the license, U. E. **"was granted the right to** allow the ice shear/pier-dike to remain on railroad property for the purpose of protecting the north wall of the power plant from damage or destruction by water borne debris and ice." Mr. Spiros further averred "that any responsibility for maintenance or repair of the ice shear/pier-dike would be upon the owners or occupiers of the Cahokia Power Plant property." All of these facts when viewed in the light most favorable to Petitioners clearly established a factual dispute relevant to the intentions of U. E. and the railroad when the license was terminated. Consequently, the trial court erred when it stated that Petitioners were strictly relying upon the two letters between U. E. and Illinois Central because it was evident that they were also relying on the affidavits as set out hereinabove which the court never addressed in its opinion. Those affidavits, when viewed in conjunction with each other, created a factual dispute and, therefore, summary judgment was not proper.

CONCLUSION

For all of the above reasons this Court must determine that the trial court erred in granting Respondents' Motion For Summary Judgment because a material question of fact exists as to a constitutionally protected property interest by Petitioners in the ice shear/pier damaged by Respondents. Consequently, this Court should reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,
THOMAS A. CONNELLY, P.C.

By .....
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was mailed, postage prepaid, this 29th day of June 1987, to E. Spivey Gault, P.O. Box 918, Greenville, Mississippi ..... and Samuel T. Vandover, 720 Olive Street, 21st Floor, St. Louis, Missouri 63101.

APPENDIX A - B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CAHOKIA MARINE SERVICE, INC., EUGENE P. SLAY and JOAN SLAY and INTERNATIONAL SURPLUS LINES INSURANCE COMPANY,
Plaintiffs,
vs.
AMERICAN BARGE AND TOWING COMPANY, **in personam,** and the M/V ATHENA, her engines, boilers, etc., **in rem,**
Defendants.

No. 85-2655A(1)

ORDER

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that the motion of defendant American Barge and Towing Company for summary judgment on plaintiffs' complaint be and is granted.

IT IS FURTHER ORDERED that the motion of defendant American Barge and Towing Company to strike portions of affidavits be and is denied.

John F. Nangle

UNITED STATES DISTRICT JUDGE

Dated: June 3, 1986

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

CAHOKIA MARINE SERVICE, INC., EUGENE P. SLAY and JOAN SLAY and INTERNATIONAL SURPLUS LINES INSURANCE COMPANY,
Plaintiffs,
vs.
AMERICAN BARGE AND TOWING COMPANY, **in personam,** and the M/V ATHENA, her engines, boilers, etc., **in rem,**
Defendants.

No. 85-2655A(1)

MEMORANDUM

This matter is before the Court on the motion of defendant American Barge and Towing Company (American Barge) for summary judgement. In this action, plaintiffs Eugene Slay, Joan Slay, and International Surplus Lines Insurance Company seek to recover for physical damage to an ice shear fence located in the Mississippi River. This damage was allegedly caused by defendant's barge when it collided with the fence. Plaintiff Cahokia Marine Service, Inc. (Cahokia Marine) asserts a claim for loss of business due to damage to the fence. As defendants argue, defendants are entitled to judgment as a matter of law because none of the plaintiffs had any property interest in the ice shear fence at the time of the collision. For the reasons set out below, defendants' motion for summary is granted.

I.

On May 27, 1984, the M/V ATHENA, owned by defendant American Barge, was headed downstream through St. Louis Harbor with a tow of 15 loaded barges. The tow attempted to pass under the Poplar Street Bridge but struck the Illinois pier of the bridge. As a result of the collision, several barges in the tow broke loose. One of those barges, the Tiger 107-B, drifted downriver and came to rest against a large concrete structure known as an ice shear fence or pile dike. This fence lies on the Illinois side of the Mississippi River in the St. Louis Harbor area, immediately upstream from a riverfront facility commonly referred to as the Cahokia Power Plant.[1/]

1/ The relevant parcel of this property is described by deed as follows:

A tract of land composed of portions of the accretions to Lots No. 225, 228, 229 and 232 of the "SUBDIVISION OF PART OF COMMONS OF CAHOKIA OR SURVEY NO. 759"; reference being had to the plat thereof recorded in the Recorder's Office of St. Clair County, Illinois in Book of Plats "A" on page 60, more particularly described as follows, to-wit:

Beginning at an iron pipe set in the Western line of the right of way conveyed by E. C. Kehr to the Venice & Carondelet Railroad Company by Deed dated October 26th, 1882 and recorded in Book 171 on page 246, in the Recorder's office of St. Clair County, Illinois, where it is intersected by the Southern line of the land of the St. Louis, Belleville & Southern Railroad Company, established by an agreement between the said Railroad Company and E. C. Kehr and Julius Pitzman by deed dated April —— 1900 and recorded in book 268 on page 310, in said Recorder's Office and running thence North 73 degrees 33 minutes West along said Southern line established by said agreement to the Eastern Outer Harbor line as established by the Secretary of War in 1903, thence Southwardly along the Eastern Outer Harbor line to a point from which the Northwest corner of the land herein described bears North 17 degrees 52¼ minutes East 1000 feet, thence South 68 degrees 42½ minutes East 1930 feet to an iron pipe, thence North 31 degrees 41¾ minutes East along the Western line of the right of way conveyed by E. C. Kehr to the aforesaid Venice and Carondelet Railway Company, 1205 feet to the place of beginning, containing 51.6 acres, more or less.

Since before 1929, the Cahokia Power Plant has been owned and operated by Union Electric Company (UE) or its predecessor corporation, Union Electric and Power Company. On May 27, 1979, UE sold the Cahokia Power Plant to G & S Motor Equipment Company (G&S) by quit-claim deed. Then, G&S quitclaimed this property to Eugene and Joan Slay for $1,000,000.00.

The damaged ice shear does not lie on the Cahokia Power Plant property. The parties agree that the fence lies just north of the northernmost boundary of this property. Until May 31, 1985, the property on which the fence was located belonged to the Illinois Central Gulf Railroad Company (Illinois Central). On May 31, 1985, the railroad conveyed the property on which the fence stands to Eugene and Joan Slay by quit-claim deed for $100,000.00. The Slays purchased without notice of an earlier license granted by Illinois Central to UE for the erection of a pile dike.

On March 14, 1929, UE and the Illinois Central executed a written instrument, purportedly licensing UE to construct a pile dike on the railroad's property. Under the terms of this instrument, UE assumed all construction and maintenance expenses of the dike and agreed to indemnify the railroad for any loss or expense attributable to the dike. The agreement was to continue in force indefinitely but could be terminated by either party upon 30 days' notice. Within ten days of termination, the railroad could require UE to remove the dike.

Pursuant to their agreement and by letter dated December 11, 1978, UE terminated the agreement and requested a waiver of the condition requiring removal of the dike.[2/]

2/ In pertinent part, the letter stated:

> We also desire to terminate an agreement dated March 14, 1929, between Illinois Central Railroad Company and Union Electric Light and Power Company covering the right to construct and maintain a pile dike and riprap pavement on the subject property of the Railroad. The purpose of this work was to prevent erosion to the Railroad property and to our adjoining property. We feel that it would be beneficial not to remove these facilities and request our waiver of the condition in the agreement where the Railroad can require the removal of the dike and riprap paving from the premises.

As the letter explained, the dike prevented erosion of both the railroad property and the adjoining power plant property. By letter dated February 23, 1979, the Illinois Central informed UE that it considered the agreements terminated as of December 11, 1978.[3/] Illinois Central also agreed not to require UE to remove the dike.

On November 27, 1985, defendant American Barge settled with the Illinois Central and obtained a realease of all claims for damages resulting from the barge accident. In this agreement, Illinois Central warranted that at the time of the accident it was the sole owner of the ice shear fence.

After the Slays purchased the Cahokia Power Plant, they attached a wire to the ice shear fence. This wire, known as a breast wire, helped secure anchored barges in the Cahokia Marine fleet. In addition, the Slays installed a deadman anchor north of the power plant on the Illinois Central property. This anchor also secured barges in the Cahokia Marine Fleet. Representatives of the Illinois Central complained to Eugene Slay about the placement of the deadman anchor on railroad property but did not complain about the attachment of the wire to the fence.

II.

This Court has jurisdiction over this admiralty action. 28 U.S.C. §1333 and 46 U.S.C. §740.

3/ Illinois Central replied in pertinent part:

> This refers to your letter December 11, 1978 concerning the desire of Union Electric Company to terminate, at this time, . . . an agreement dated March 14, 1929 covering a pile dike and riprap pavement.
>
> This it to advise the Illinois Central Gulf Railroad Company has no objections to the termination of these agreements and, also, that we will not require your company to remove the dike and riprap paving from our premises as provided for in the March 14, 1929 agreement.
>
> We shall consider the agreements as having been terminated and of no further force and effect as of January 11, 1979, except for any liabilities that may have accrued thereunder prior to such termination date.

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he can "show that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." **Fed.R.Civ.P.** 56(c). **See also Poller v. Columbia Broadcasting System, Inc.,** 368 U.S. 464 (1962). In passing on a motion for summary judgment, a court is required to view the facts and inferences that may be derived therefrom in the light most favorable to non-moving party. **Buller v. Buechler,** 706 F.2d 844, 846 (8th Cir. 1983); **Vette Co. v. Aetna Casualty and Surety Co.,** 612 F.2d 1076, 1077 (8th Cir. 1980). The burden of proof is on the moving party, and a court should not grant a summary judgment motion unless it is convinced that there is no evidence to sustain a recovery under any circumstances. **Buller,** 706 F.2d at 846. However, under Rule 56(e), a party opposing a motion for summary judgment may not rest upon the allegations of his pleadings but "must set forth specific facts showing that there is a genuine issue for trial." **Fed.R.Civ.P.** 56(e). **See also** 10A Wright, Miller and Kane, **Federal Practice and Procedure,** §2739 (1983).

In Court I, plaintiff Cahokia Marine seeks to recover for economic losses resulting from damage to the ice shear fence. Presumably, Cahokia Marine was unable to dock its fleet of barges at the Cahokia Power Plant after the accident. As defendant argues, because Cahokia Marine never had a proprietary interest in the ice shear fence, Cahokia Marine fails to state a claim. Plaintiff Cahokia Marine has not responded to this argument.

Claims for economic loss unaccompanied by physical damage to a proprietary interest are not recoverable in maritime tort. **Robins Dry Dock & Repair Co. v. Flint,** 275 U.S. 303 (1927); **Louisiana ex rel. Guste v. M/V TESTBANK,** 752 F.2d 1019 (5th Cir. 1985); **In re Williamson Leasing Co., Inc.,** 577 F. Supp. 890 (E.D.Mo. 1984). In **Williamson,** railroad employees sought to recover for economic losses suffered after a barge collided with a railroad bridge and closed the bridge to railroad traffic. Consequently, railroad employees were temporarily layed off. Applying the rule of **Robins Dry Dock,** the court dismissed the action.

This Court finds the principle of **Robins Dry Dock** applies to the facts of this case. Here, plaintiff Cahokia Marine seeks to recover economic losses but does not allege a proprietary interest in the ice shear fence. Therefore, defendant is entitled to judgment as a matter of law.

In Court II, plaintiffs Engene and Joan Slay seek to recover for physical damage to the ice shear fence.[4/] As defendant argues, plaintiffs cannot recover because the Slays did not own the fence at the time of the collision, and the railroad's right of action did not pass to the Slays as a subsequent purchaser. Plaintiffs have shifted their position during the course of this litigation. In their complaint, plaintiffs allege ownership of the fence in fee at all relevant times. However, in response to the summary judgment motion, plaintiffs assert an easement in the fence. As plaintiffs argue, the December 11, 1978 letter and the February 23, 1979 response grant UE an express easement appurtenant. This easement passed to the Slays when they purchased the Cahokia Power Plant, the dominant tenement. Alternatively, the plaintiffs assert an interest in the fence created when their predecessor, UE, built the structure to benefit its property. Plaintiffs do not assert a claim based upon their subsequent purchase of the fence.

The Court must first choose the proper law to apply. Generally, the rights of riparian landowners along a navigable stream are governed by state law. **Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,** 429 U.S. 363, 378-81 (1977).[5/] All property at issue in this lawsuit lies on the Illinois side of the Mississippi River. Thus, Illinois law applies.

4/ International Surplus Lines Insurance Company has been joined as a necessary party.

5/ However, if the navigable stream forms an interstate boundary, federal common law governs rights to the bed on the boundary. 429 U.S. at 375. This exception to the general rule does not apply in the instant case because the property in question does not lie on the Illinois-Missouri boundary but lies entirely within Illinois. In other words, federal common law does not apply because the outcome of this litigation will not alter an interstate boundary.

The first issue is whether UE had an easement appurtenant in the fence and whether this easement passed to the plaintiffs. Under Illinois law, an easement appurtenant is a right or privilege in the real estate of another exercised in connection with occupancy of other land. **Beloit Foundary Co. v. Ryan,** 28 Ill.2d 379, 192 N.E.2d 384 (1963). Easements may be created by contract as well as by grant, but such agreements must be construed so as to carry out the plain intent of the parties. **Chicago Title & Trust Co. v. Walbash-Randolph Corp.,** 384 Ill. 78, 51 N.E.2d 132 (1943). Easements established by contract must contain the formal elements of a deed. **Coomer v. Chicago and Northwestern Transportation Co.,** 91 Ill. App.3d 17, 46 Ill. Dec. 812, 414 N.E.2d 865 (1980). Though no particular words are necessary to constitute a grant of an easement, such words must show clearly an intention to confer the easement. **Aebischer v. Zobrist,** 56 Ill. App.3d 151, 13 Ill. Dec. 911, 371 N.E.2d 1003 (1977). An easement appurtenant passes with dominant tenement without specific mention in the deed or sale contract. **Harris Trust and Savings Bank v. Chicago Title & Trust Co.,** 84 Ill. App.3d 280, 39 Ill. Dec. 658, 405 N.E.2d 411 (1980).

No document expressly grants an easement appurtenant to the Slays or to their predecessor, UE. Instead, plaintiffs rely upon the two letters between UE and Illinois Central to establish an easement. The Court finds the clear intent of these letters was to terminate the 1929 license. Neither letter contemplates any further relationship between the parties with respect to the ice shear fence. Furthermore, plaintiffs present no evidence to indicate that these letters do not contain the true or complete intent of UE and Illinois Central. Therefore, the correspondence between UE and the railroad did not grant an easement, and an easement appurtenant did not pass to the Slays when they bought the power plant property.[6/]

6/ In his affidavit, Eugene Slay states that during negotiations for the power plant property UE representatives told him that the fence was part of the power plant. Assuming UE made such statements, these statements do not create, **ex proprio vigore,** a property interest upon which the Slays may recover against a third party.

Plaintiffs also assert a property interest in the ice shear fence because the fence was constructed by UE to benefit its property. Plaintiffs rely upon **Crawford v. West India Carriers, Inc.,** 337 F. Supp. 262, 276 (S.D.Fla. 1971) **rev'd sub nom. on other grounds, Twenty Grand Offshore Inc. v. West India Carriers, Inc.,** 492 F.2d 679 (5th Cir. 1974), **cert. denied,** 419 U.S. 836, which they cite for the principle that a riparian landowner who constructs a structure on land owned by another has a property interest in the structure which permits recovery for damage resulting from other's negligence. In **Crawford,** an ocean-going barge ran aground and damaged groins used to protect beach front hotel property.7/ The hotel owner did not own the property on which the groins stood but had obtained a permit from the U.S. Army Corps of Engineers to construct the groins. Thus, the hotel owner had an interest in the nature of a servitude for the construction and maintenance of the groins. As the court held, the plaintiff had a property interest in the groins which permitted him to recover for their damage. Though this Court has found no Illinois law on point, we may assume that Illinois courts would apply this common law principle.

Crawford may be distinguished from the instant case. In purchasing the power plant, the Slays could only acquire the rights which their predecessors held. Thus, the Court must look to the interests held by UE. UE had a license to construct and maintain the fence but relinquished its rights when it terminated the license. At that point, UE's interest in the fence reverted to the railroad. As discussed above, UE did not receive an easement or other servitude upon termination of the license. Furthermore, UE obtained no legally cognizable interest merely because the fence benefited UE property. Consequently, the Slays have no interest in the fence and may not recover for its damage.

John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: June 3, 1986

7/ A groin is a structure for the protection of uplands against erosion and other action of the sea. **See** 38 C.J.S. **Groin** (1943).

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-1845

Cahokia Marine Service, Inc., Eugene P. Slay and Joan Slay and International Surplus Lines Insurance Company,
Appellants,
v.
American Barge & Towing CompanyCompany, In Personam and the M/V Athena, Her Engines, Boilers, etc., **In Rem**
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 16, 1987
Filed: February 5, 1987

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

Eugene and Joan Slay and their tenant, Cahokia Marine Services, Inc. (appellants), appeal from the district court's[1/] grant of summary judgment in favor of the American Barge and Towing Company (American Barge). We affirm the decision of the district court.

1/ The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

On May 27, 1984, a ship owned by American Barge was headed downstream with a tow of fifteen loaded barges when several barges in the tow broke loose and struck a large concrete structure known as an ice shear fence. The ice shear fence was located on the Illinois side of the Mississippi River on property owned by the Illinois Central Railroad. Eugene and Joan Slay owned the parcel of land adjacent to the ice shear fence, having purchased it from G & S Motor Equipment Company, who in turn had purchased the property from Union Electric Company.

In 1929, Illinois Central granted a license to Union Electric to construct and maintain the ice shear fence. Union Electric terminated this license in 1978 and Illinois Central waived the condition requiring Union Electric to remove the fence upon termination of the license. Appellants argue that the agreed purpose of this waiver was to protect the Union Electric property, creating an easement appurtenant in the fence, which then transferred to the Slays when they purchased the dominant tenement in 1979.

Appellants seek to recover for the physical damage to the ice shear fence and for loss of business income resulting therefrom.

The district court granted appellee's motion for summary judgment holding that under controlling Illinois law, an easement appurtenant had not been created at the time of the termination of the license between Illinois Central and Union Electric. The district court concluded that appellants had no legally cognizable properietary interest in the fence and they, therefore, could not recover for its damage.

We have carefully studied the record, including the decision by the district court and the contentions raised by the parties in their briefs. We find no merit in appellants' arguments, and accordingly affirm on the basis of the district court's opinion. **See** 8th CIR. R. 14.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-1845EM

Cahokia Marine Service, Inc., et al.,
Appellants,
v.
American Barge & Towing Company, etc., et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Appellant's petition for rehearing has been considered by the Court and is denied.

March 31, 1987

Order entered at the Direction of the Court:
Robert S. St. Viair
Clerk, U. S. Court of Appeals, Eighth Circuit.